Supreme Court of the United States

OCTOBER TERM, 1942

No. _____

BERTHA R. LINDER, in behalf of herself and other owners of Manhattan 4% Second Mortgage Bonds,

Petitioner,

against

VAN S. MERLE-SMITH and others, as Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Gold Bonds,

Respondents.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the District Court is not reported, but may be found on page 91 of the Record.

The opinion of the United States Court of Appeals is not reported, but may be found on page 99 of the Record.

Jurisdiction

The jurisdiction of this Court to issue the writ of certiorari applied for is predicated upon Title 28 of the United States Code, Section 347.

The reasons relied on for the allowance of the writ are:

that the United States Circuit Court of Appeals for the Second Circuit erred in deciding that the previous decision of the Circuit Court of Appeals, limiting the recovery of the holders of Manhattan Second Mortgage Bonds, was *res adjudicata,* preventing such bondholders from making an application to file their bonds *nunc pro tunc* and assenting to the Plan so that they may receive the same amount after adjustment of interest as such bondholders who assented to the Plan;

in deciding that it was proper to penalize the bondholders who have not assented to the Plan, by depriving them of equal participation to those who have not appealed from the orders confirming the Plan;

in not following the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Warner Brothers Pictures, Inc.* v. *Lawton-Byrne-Bruner Insurance Agency, et al.,* 79 F. (2d) 804;

and that the decision of the Circuit Court of Appeals for the Second Circuit is in conflict with the rule that a litigant should not be penalized for seeking a judicial remedy from an erroneous ruling.

Statement of the Case

The statement of the case is set forth in the petition for writ herein.

Specifications of Error

The United States Circuit Court of Appeals erred:

First. In deciding that the previous decision of the Circuit Court of Appeals, limiting the recovery of the holders

of Manhattan Second Mortgage Bonds, was *res adjudicata,* preventing such bondholders from making an application to file their bonds *nunc pro tunc* and assenting to the Plan so that they may receive the same amount after adjustment of interest as such bondholders who assented to the Plan.

Second. In deciding that it was proper to penalize the bondholders who have not assented to the Plan, by depriving them of equal participation to those who have not appealed from the order confirming the Plan.

Third. In not following the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Warner Brothers Pictues, Inc.* v. *Lawton-Byrne-Bruner Insurance Agency, et al.,* 79 F. (2d) 804.

Summary of Argument

I. The previous decision of the Circuit Court of Appeals, limiting the recovery of the holders of Manhattan Second Mortgage Bonds, is not *res adjudicata,* preventing such bondholders from making an application to file their bonds *nunc pro tunc* and assenting to the Plan so that they may receive the same amount after adjustment of interest as such bondholders who assented to the Plan.

II. It was not proper to penalize the bondholders who had not assented to the Plan, by depriving them of equal participation to those who had not appealed from the orders confirming the Plan.

III. The decision is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Warner Brothers Pictures, Inc.* v. *Lawton-Byrne-Bruner Insurance Agency, et al.,* 79 F. (2d) 804.

IV. The decision of the Circuit Court of Appeals is in conflict with the rule that a litigant should not be penalized for seeking a judicial remedy from an erroneous ruling.

ARGUMENT

I

The previous decision of the Circuit Court of Appeals limiting the petitioner's recovery made upon an appeal from an order denying such bondholder's application for an extension of time to assent to the plan until all rights to appeal on a petition for certiorari have elapsed is not *res adjudicata* of an application made after such time has expired. Such decision, before the expiration of said time, being unnecessary to the determination of the issues upon said previous appeal, the doctrine of *res adjudicata* does not apply.

The Circuit Court of Appeals dismissed the petitioner's appeal on the ground "because no substantial issue remained for decision". In other words, that the previous decision of that Court was *res adjudicata.*

Upon the previous appeal, limiting the bondholders' recovery to $394.68 per $1,000 bond, the contention of the dissenting bondholders was that there had been no proceedings which had validly determined the cash distributive shares to which holders of said bonds were legally entitled, and that the foreclosure sale was merely a device to coerce a reluctant holder into the acceptance of the Plan and that in fact the bonds were entitled to be paid in full.

It was unnecessary for a decision on the previous appeal to determine in advance whether the bondholders, after the expiration of time to file their assent to the Plan, should be relieved of their default in doing so.

In other words, the situation is analogous to one where a litigant asks in advance for an extension of time to file his answer to a complaint and his application is denied.

The mere fact that such application is denied is not *res adjudicata* of an application to be relieved of the default thereafter occurring in filing an answer.

Similarly in the case at bar, the decision that the Plan is fair and equitable is not *res adjudicata* of an application to be relieved of a default in not assenting to the Plan.

The decisions are many that an adjudication unnecessary to the determination of the issues previously before the Court is not *res adjudicata* of an application thereafter arising. A judgment does not operate as an estoppel in a subsequent action between the parties as to immaterial or unessential facts even though put in issue by the pleadings and directly decided.

Reynolds v. *Stockton*, 140 U. S. 254, 269; 11 S. Ct. 773, 777;
House v. *Lockwood*, 137 N. Y. 259, 270;
Landon v. *Clark*, 221 Fed. 841;
34 C. J. 928;
2018 Seventh Ave. Inc. v. *Nachaus*, 289 N. Y. 490.

II

There being no contention that the previous appeals, taken by the petitioner to nullify the plan, were not taken in good faith, the petitioner should not be penalized for taking such appeals. There is no proof of any substantial prejudice by the reason of Manheim's previous opposition or appeal.

Jameson v. *Guaranty Trust Company of New York*, 20 F. (2d) 808 (C. C. A. 7), was an appeal by a Committee of

dissenting bondholders from a decree confirming the foreclosure sale of the properties of Chicago, St. Paul & Milwaukee Railroad Company, which decree, among other things, found fair and equitable a Plan of Reorganization of the Railroad. The Jameson Committee contended, as did Manheim in the prior proceedings, that it was entitled to an insurance policy—that is, to a provision in the decree that, if the appeals were unsuccessful, the bonds might, nevertheless, be deposited under the Plan. The Circuit Court of Appeals denied that contention but directed modification of the decree so as "to allay all fear of oppressive or speculative action", by specifically requiring approval of the District Court of any action of the Reorganization Managers in terminating the right to deposit under the Plan. The opinion by Circuit Judge Alschuler, at page 814, states:

> "* * * it is scarcely conceivable, that pending this litigation, and for a reasonable time after its termination, either party will, in this respect, seek, any undue advantage of the other. The objection affects the manner of carrying out the Plan rather than the Plan itself."

Of course, the Jameson case is distinguishable. One significant difference is that "pending this litigation" (emphasis ours) the City has sought and today seeks "undue advantage" of appellant. The Jameson case denied the Jameson Committee its insurance policy, but clearly contemplated subsequent application to the District Court for permission to assent. The Circuit Court of Appeals in the present case went no further than to deny Manheim his requested insurance policy. It made no ruling in respect to any future application which Manheim might make, if, as and when his appeals might be finally determined. The District Court has always retained the *power* to exercise its discretion to permit him, after determination of the appeals, to become an assenter to the Plan, provided that could be accomplished without prejudice to other rights involved.

In the case of *Warner Brothers Pictures, Inc.* v. *Lawton-Byrne-Bruner Insurance Agency, et al.*, 79 F. (2d) 804 (C. C. A. 8), Judge Stone said as follows (p. 820):

> "Obviously, a holder of second bonds could not challenge the plans without withholding his bonds from deposit. If he has a right to challenge the plans in the trial court, he has, generally speaking, a right to test by appeal (without alteration of his rights) an unfavorable determination in the trial court. We say this is true 'generally speaking' because we do not mean to say that in all instances a right of participation may be preserved during appeal. There may be instances where a dissenter has a choice between participation and a payment and where the plan is so formed that it would be seriously endangered by the delay caused by a dissenter's appeal. As to such situations and possibly others, we leave the matter expressly unexamined and undetermined. What we do say is that an appellant from the fairness of a plan of reorganization where his only chance of any realization whatsoever entirely depends upon participation under the plan cannot fairly be denied such participation solely because of delay entirely caused by his prompt prosecution of an appeal from an order approving the plan. This determination does not mean that the plans here involved are rendered void by this defect, but it does mean that this appellant must be allowed to participate in the plans to the extent of any or all of the above second mortgage bonds held by it. Such participation is limited to such of said bonds as it may offer for participation within 20 days after filing below of the mandate of this court on final determination of this litigation."

It is a well-known rule of equity jurisprudence that courts of equity abhor forfeitures. It is not claimed that there has been any prejudice to any one. Consequently, appellant having acted in good faith, his appeal is meritorious and should not have been dismissed.

III

The decision of the Circuit Court of Appeals is in conflict with the rule that a litigant should not be penalized for seeking, in good faith, a judicial remedy from an erroneous ruling.

Natural Gas Pipeline Co. of America v. *Slattery,* 302 U. S. 300; 58 S. C. 199;
Van Dyke v. *Geary,* 218 Fed. 111; Aff'd 244 U. S. 39; 37 S. Ct. 483;
Ex parte Young, 209 U. S. 123, 147; 28 S. C. 441, 447.

In *Natural Gas Pipeline Co. of America* v. *Slattery, supra,* Justice Stone said (p. 204):

> "As the act imposes penalties of from $500 to $2,000 a day for failure to comply with the order, any application of the statute subjecting appellant to the risk of the cumulative penalties pending an attempt to test the validity of the order in the courts and for a reasonable time after decision, would be a denial of due process, * * *"

In *Van Dyke* v. *Geary, supra,* it was said (p. 121):

> "On the authority of these cases and on principle we are of the opinion, and so decide, that said Act 90 of the First Legislature of the state of Arizona imposes such penalties and imprisonment as to practically deprive the complainant of the right to appeal to the court to determine the validity of the law and the orders of the corporation commission, and is therefore unconstitutional in that particular."

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

KATZ & SOMMERICH,
Solicitors for Petitioner.

MAXWELL C. KATZ,
OTTO C. SOMMERICH,
of Counsel.